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CASE NO. 82-52

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ARIZONA GOVERNING COMMITTEE, etc., et. al.,

Petitioners,

vs.

NATALIE NORRIS, on behalf of herself and all others similarly situated,

Respondents.

BRIEF FOR AMICUS CURIAE THE STATE OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

DANIEL C. BROWN
GENERAL COUNSEL
Department of Administration
435 Carlton Bldg.
Tallahassee, Florida 32301
904-488-4747

MITCHELL D. FRANKS
ASSISTANT ATTORNEY GENERAL
Department of Legal Affairs
The Capitol-Suite 1501
Tallahassee, Florida 32301
904-488-1573

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BRIEF FOR AMICUS CURIAE THE STATE OF FLORIDA

INTEREST OF THE STATE OF FLORIDA AS AMICUS CURIAE

For many years the State of Florida has operated pension plans for various groups of public employees in the state. During 1970, membership in the pre-existing plans was closed, a new consolidated pension system, The Florida Retirement System, was legislatively mandated, and administration of the plans was consolidated under the Florida Department of Administration, Division of Retirement, an executive agency of the State of Florida. The present pension system, FRS, is created by Chapter 121, Florida Statutes, and is governed thereby, as well as by rules adopted by the Department of Administration, which are contained in Chapter 22B, Florida Administrative Code. Pertinent excerpts from the statutes and rules are set forth in the appendix.

Membership in FRS is mandatory for all employees of covered public employers. §121.051, FLA. STAT., (1981). The system is what is known generally as a defined benefit plan. Members receive a fixed benefit, or set of benefit options. The contributions necessary to fund the liability for those benefits are adjusted from time to time as the need to do so is indicated by periodic actuarial studies. Until 1975, both the employee and the employer made contributions to fund the pension system. The contribution rate required of employees was equal for both men and women.

In 1975, FRS became non-contributory. Contributions for public employees were eliminated and the total contribution obligation became that of the employing public agencies, to be paid from their operating budgets. §121.071, FLA. STAT. (1981). Thus, the plan was not perceived as being

at variance with the holding in City of Los Angeles, Department of Water and Power v. Manhart, (hereinafter "Manhart"), 435 US 702, 55 L. Ed. 2d 657, 92 S. Ct. 1370 (1978).

The membership in FRS is presently composed of nearly 400,000 active members (those who are currently employed by a covered public employer) and nearly 70,000 retired members drawing benefits.

The legislative creation and governance of FRS under Chapter 121 arose in part because of a need to impose actuarial soundness on public retirement systems. Indeed in 1976 an amendment to the State Constitution was ratified by the voters which constitutionally requires actuarial soundness in public retirement systems. Art. X, Sec. 14, FLA. CONSTITUTION (1968). Legislative oversight of FRS also mandates actuarial soundness. §§121.135, 121.192, FLA. STAT. (1981)

The public and legislative concern for the actuarial soundness of the public retirement systems was justified. The dramatic increase in contribution rates contained in §121.071, Florida Statutes,[1] was occasioned by a past service deficit of nearly four billion dollars in pre-existing pension systems for State employees. That debt is being amortized by increased contributions over a 30-year period ending in the year 2007 A.D.

1/ §121.071 Contributions.-
(2) Until January 1, 1975, each employer shall contribute an amount equal to the total of its member contributions, made under subsection (1), each pay period. Effective January 1, 1975, and until October 1, 1978, each employer shall contribute 9 percent of gross compensation each pay period for each of its regular members and 13 percent of gross compensation each pay period for each of its special risk members. Effective October 1, 1978, each employer shall contribute 9.1 percent of gross compensation each pay period for each of its regular members and 13.95 percent of gross compensation each pay period for each of its special risk members. Effective October 1, 1981, each employer shall contribute 10.93
(Footnote 1/ continued on p.5)

The benefit provisions of FRS which are of concern are set out in §121.091(6), Florida Statutes.[2]

The option offered by subparagraph 1 of §121.091(6)(a) is known as "Option 1". It is the option most often selected by employees retiring under the plan. Option 1 treats similarly situated men and women identically. Similarly situated males and females receive an equal monthly retirement

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1/ Continued

percent of gross compensation each pay period for each of its regular members and 13.91 percent of gross compensation each pay period for each of its special risk members.

2/ §121.091 Benefits payable under the system.

(6) Optional Forms of Retirement Benefits.

(a) A member shall elect, prior to the receipt of his first monthly retirement payment, to receive the retirement benefits to which he is entitled under subsection (1), subsection (2), or subsection (3) of this section in accordance with one of the following options:

1. The maximum retirement benefit payable to the member during his lifetime. (Footnote 2/ continued on p. 6)

benefit for the remainder of their lives.[3] The retirement plan is financed by predicting the amount of funds necessary at time of retirement to guarantee a member's benefit under Option 1.

2/ Continued

2. A decreased retirement benefit payable to the member during his lifetime and, in the event of his death within a period of 10 years after his retirement, the same monthly amount shall be payable for the balance of such 10 year period to his beneficiary or, in case the beneficiary is deceased, in accordance with subsection (8) of this section as though no beneficiary had been named.

3. A decreased retirement benefit which shall be payable during the joint lifetime of both the member and his joint annuitant and which shall continue after the death of either during the lifetime of the survivor in the same amount.

4. A decreased retirement benefit which shall be payable during the joint lifetime of the member and his joint annuitant and which shall continue after the death of either during the lifetime of the survivor in an amount equal to 66-2/3 percent of the amount which was payable during the joint lifetime of the member and his joint annuitant.

3/ Option 1 is a benefit payable for the life of the retiring member. It is calculated as follows. The employee's Average Final Compensation is determined. AFC is the average (Footnote 3/ continued on p.7)

As the Court noted in Manhart, it is undeniably true that women, as a class, outlive men, as a class.[4] In prognosticating the contributions needed to keep FRS actuarially sound, it is therefore necessary to take that fact into account and to reflect it in the financial planning for the system.[5]

3/ Continued

of the 5 most highly paid years of the employee's career. Next, the number of years of creditable service, as defined in the plan, is multiplied by a factor, which varies with the retirement category but which is the same for men and women in each category. That results in a percentage which is then multiplied by the retiree's AFC to determine the yearly retirement benefit and divided by 12 to arrive at the monthly benefit. To illustrate, if a man and a woman were retiring at normal retirement age and each had 20 years of service in the regular membership category and an average final compensation of $10,000, their retirement benefits would be calculated thusly:

1. 20 years x 1.60% - 32%
2. 32% x $10,000(AFC) = $3,200
3. 3200 ÷ 12 = $266.67 (monthly benefit)

Each member, male or female, would receive the same benefit for his or her life.

4/ 98 S. Ct. 1370 at 1375.

5/ 98 S. Ct. 1380 at 1380.

For example, if a male member retires at age 66, with an Option 1 benefit entitlement of $10,000 per year, statistical experience shows that the system will require $94,000 to provide the benefit for his life. However, a female retiree in the same circumstances will require the system to expend $111,600, or 18.9% more, to pay her the same benefit for life. Those historical experiences are calculated and considered in setting the contribution rates exacted from employers to keep the system actuarially sound.

Although the FRS is funded based upon Option 1, employees may voluntarily elect Options 2, 3, or 4. Those options are survivorship options. A member may select one of them, based upon the member's own experience and judgment as to whether the spouse will survive and require financial support. Florida law requires, for the soundness of the system, that Options 2, 3, and 4 be the actuarial equivalent of the member's Option 1 benefit.

§121.091(6)(b), FLA. STAT. (1981). The State Retirement Administrator is required to adopt tables of actuarial factors necessary to reach actuarial equivalence. Historically, and today, in conformity with insurance practices, those tables are based on sex-distinct mortality rates.

As a result, males selecting one of the elective survivorship options, receive a smaller monthly benefit. That occurs because the system must predict the probability that the spouse will survive the retired employee and continue to draw benefits. The probability of a male's spouse surviving him is greater than the probability of a female's spouse surviving her, and the survivorship tables take that actuarial fact into account.

Thus, the FRS plan has a number of similarities to this case and the State of Florida is vitally interested in the issues before the Court. Although the case under review involves a contributory optional plan

to defer compensation for tax considerations, Arizona finds itself in much the same situation as Florida: an employee benefit plan which provides no difference in contributions between male and female employees and which provides for equal monthly benefit options to similarly situated male and female employees is nevertheless suddenly vulnerable under Title VII of the Civil Rights Act of 1964 because of the decision by the Ninth Circuit in this case that each and every elective option in a plan must be based on other than sex-distinct actuarial tables.

SUMMARY OF ARGUMENT

Although the Manhart holding was limited to the situation in which an employer-operated pension required unequal employee contributions to the plan, ensuing decisions have extended the Manhart rationale to prohibit employer-operated plans from distributing

unequal benefits to male and female employees based upon sex-distinct actuarial tables. However, not until the instant case has a reported decision struck down a plan which (1) does not exact unequal contributions, (2) provides pay-out options identical for both males and females and (3) provides other purely voluntary options which are based upon sex-distinct actuarial factors. Not until now have the courts held that no option in an employer's plan may take into account historical statistical data on sex-differentiated mortality rates even though participation in such an option is a matter of voluntary choice by the member and even though the plan offers benefit options which treat individual members identically regardless of their sex.

The decision below is wrong and should be reversed for a number of reasons. Firstly, decisions prior to this case dealt with cases where a female employee received less

in periodic benefits and was required to accept that disparity. In this case, and under State of Florida's retirement system, the employee is not faced with that choice. Rather employees are provided an option which treats them equally. Under both Arizona's deferred compensation plan and Florida's pension system, employees may voluntarily select among other options. It is true that benefits under some options are based upon class-wide knowledge about differences in male and female mortality rates, but it must be emphasized that an employee will select such an option only if he or she agrees with the proposition that the class-wide prediction of life-expectancy based upon sex-distinct data matches his or her individual predictions. That does not constitute an imposed assumption, but rather a belief on the part of the selecting retiree. The provisions of Title VII should not be extended to prohibit the inclusion of purely

voluntary options in a retirement plan which take into account sex-distinct actuarial data where the employer does not otherwise make sex-based distinctions and where the employer provides equal benefit provisions. The inclusion of such voluntary options is in no sense imposed discrimination against an individual employee. Rather, such options allow flexibility in an employee's decisionmaking. To hold that such voluntary options violate Title VII would result in the removal of that flexibility.

ARGUMENT

1. An employee pension or deferred compensation plan does not discriminate based on sex when the plan does not require unequal contributions and when the plan offers a range of options, some of which provide equal payments and some of which do not, but the decision to select an option is purely voluntary.

Manhart involved a case where all female employees were required to make contributions to a retirement plan in greater

amounts than males, based upon sex-distinct mortality tables. As a result, while females were working, they received smaller pay checks because of the sex-based tables. Yet there was no assurance that a given female would live as long as the mortality tables indicated and collect the greater pension amounts predicted by the tables. Since Manhart, a number of cases have extended its reasoning and have held that providing unequal benefits based upon sex-distinct mortality tables violates Title VII. However, except for the decision under review, those holdings dealt with cases in which employees had no choice but to accept differing benefit payments. Equal Employment Opportunity Commission v. Colby College, 589 F. 2d 1139 (1st Cir. 1978), involved a plan which required participation and offered only annuities based on sex-distinct mortality tables, so that women were forced to accept smaller monthly retirement benefits. Women In City Government

United v. City of New York, 515 F. Supp. 295 (S.D.N.Y. 1981), concerned another compulsory retirement system which exacted higher contributions from females and which paid lower monthly benefits to women without any choice on their part. Sprit v. Teachers Ins. and Annuity Ass'n, 475 F. Supp. 1298 (S.D.N.Y. 1979), likewise involved a pension plan which forced unequal monthly retirement benefits upon women, although contributions were equal.

There is a significant and compelling difference between the pension plans in those cases, on the one hand, and the deferred annuity program offered by Arizona and the State of Florida pension system, on the other. That difference was overlooked by the Ninth Circuit in its decision.[6] Under the Arizona deferred compensation plan and under Florida's pension system, unequal contributions are not

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6/ Norris v. Arizona Governing Committee, 671 F. 2d 330 (9th Cir. 1982)

required. Under Arizona's plan, employees decide how much of their pay they wish to defer for tax purposes. Under Florida's pension plan, contributions for all employees are equal, and, since 1975, have been paid entirely by the employer. Both plans provide a number of options among which an employee may voluntarily choose. Some of those options provide for equal payments for similarly situated males and females. Other options provide differing annuity payments based upon mortality expectations which are sex-distinct.[7]

7/ Arizona's plan offers all employees a lump-sum payment option and a time-certain periodic payment option, which produces identical benefit payments for employees. The plan's annuity options produce lower monthly benefits to females. FRS provides equal lifetime monthly benefits to similarly situated males and females. If, however, an employee decides to choose a joint annuitant or survivorship option, the life expectancy of the employee's spouse, based upon the spouse's sex, is taken into account in determining the amount of monthly benefits.

Thus, unlike Manhart, where females had no choice, the Florida pension system does not impose sex-based discrimination on any male or female employee. Decisions of this Court indicate that the ability to make a choice which avoids gender-based classification precludes a finding of discrimination. Compare Parham v. Hughes, 441 US 347 (1979), with Caban v. Mohammed, 441 US 380 (1979).

The Florida pension plan does not impose stereotyped assumptions at all. It offers the Option 1 benefit, which is the highest amount an employee will receive, and which is the same for men and women employees.

All other options are survivorship options. They provide an income for the life of the employee and his spouse. In those options, Florida's plan takes into account the necessity to predict as accurately as possible the expected life of the spouse.

There is little dispute that the stratification of mortality statistics by sex yields a more accurate prediction of life expectancy in an individual case than does the use of unstratified data. See Benston, The Economics of Gender Discrimination Revisited, 49 University of Chicago L.Rev. 489, 499-500, 524. Under Florida's plan, the maximum lifetime benefit to any employee is that provided by Option 1 - an equal payment for life to similarly situated men and women. Hence, a choice by an employee to select a survivorship option is necessarily based on the employees' own assessment that his or her spouse will survive him. The employee who chooses a survivorship option does so because of his concurrence with the predictions shown by gender-based mortality data. If an employee does not concur with that assessment, if he believes otherwise, he will rationally take Option 1, which is the maximum retirement

benefit.

It is submitted that a plan which does not force unequal benefits on an employee because of the individual's sex, but which allows the employee to accept or reject, believe or disbelieve, the predictions of life expectancy concerning his spouse in deciding on a distribution of retirement benefits does not discriminate at all under 42 USC §2000e-2 as construed in Manhart. Each employee, male or female, may accept or reject the sex-distinct prediction about the life expectancy of the spouse in their individual cases and voluntarily select an option accordingly. See Equal Opportunity Employment Commission v. Colby College, 589 F. 2d 1139, 1146 (1st Cir. 1978)(Coffin, C.J., concurring).

2. The Ninth Circuit's holding that no plan may offer even a voluntary option which pays benefits to an employee based on gender-distinct mortality rates will result in removing any flexibility for individual employees in their financial planning.

The Court should be aware that if the Ninth Circuit's holding in Norris is upheld, the result will be loss of flexibility in financial planning for members of plans such as Florida's, with no long-term benefit to either males or females. Should the Norris decision stand unaltered, Florida would have two fiscally responsible alternatives in bringing its plan into compliance with such a standard.

Florida could repeal those portions of Chapter 121, Florida Statutes, which provide survivorship options to its public employees. That would leave only Option 1 available to members, which would certainly satisfy the requirements of Title VII as construed in Norris. It would mean, however, that future retirees would have no ability to provide survivorship annuities to their spouses under the plan.

Another solution would be to construct a "unisex" mortality table for the survivor-

ship options. The actuarially sound method for doing so would be to merge the existing gender-based actuarial factors by use of a weighted averaging method. The long-term result of doing so would be an eventual return to the lower mortality factors presently used for males under the survivorship options, because of the principle of adverse selection.

Consider for illustration one set of actuarial factors now in use under FRS for the survivorship options:

Male 66 with female spouse 64 - .71218

Female 66 with male spouse 64 - .86854

To develop a unisex factor for that age combination, the existing factors would be averaged by the following process. The proportions of males and females historically selecting the survivorship options are calculated, those proportions are

multiplied by the existing male and female factors respectively, and the resulting products are added to arrive at a "unisex" factor thusly:

.85 (the male percentage of retirees selecting survivor options) X .71218 (present male factors) + .15 (the female percentage of retirees selecting survivor options) X .86854 (present female factor) = .73563 (unisex factor).

The resulting factor is greater than the present male factor and less than the current female factor, but lies closer to the male factor, since men tend to be older than their spouses and since they tend to select a survivorship option more often.

If a "unisex" table were adopted, females would rationally select survivorship options less often than they do now. Females presently select survivorship options far less than males, although the sex-differentiated tables provide for less of

a reduction than that for males. The only explanation for that phenomenon is that females who retire are individually judging that they will, indeed, survive their male spouses. Under a "unisex" table, females would experience an even greater reduction than that presently required. Therefore, over time, fewer and fewer females could be expected to take a survivorship option. The population of those selecting a survivorship option would become increasingly male. And, as it does, periodic adjustments in the "unisex" rate will be skewed more and more toward the present male actuarial factor. Eventually, the "unisex" tables would yield factors very close to the values of present male factors in sex-distinct tables. Males would not receive higher monthly benefits in the long run and females would be forced out of survivorship options because of the unrealistically high cost of taking such options in relation to

their own individual judgments that they can expect to outlive their spouses.

The irony is that such a result would not occur because females or males would be forced to make stereotyped assumptions about their spouses' life expectances in relation to their own - the unisex table would remove any such assumption from their planning decisions. It would occur because individual females know that they can expect to live longer than their spouses, individual males know that they can expect to live shorter lives, and individuals act according to that knowledge.

While Title VII may prevent an employer from forcing upon individual employees a generalized but valid prediction about life-expectancy associated with gender, it does not follow that an employer is guilty of discrimination because he provides options which do not require acceptance of the prediction and also allows employees to select

options which do. In such a case, it is not the employer, but rather the employee who is determining that the "stereotyped" assumption applies to his or her individual case.

In short, it is not a violation of 42 USC §2000e-2 for an employer to allow each individual employee to make decisions based upon stereotyped generalizations of life expectancy. Norris holds otherwise and should be reversed. If not, the result will be imposed rigidity and curtailment of financial planning options for retirees with no concomitant benefits.

CONCLUSION

The State of Florida urges the Court to reverse the decision of the Ninth Circuit in Norris v. Arizona Governing Committee and to do so on the ground that Title VII does not prohibit an employer from offering annuity options to its employees which are

based upon sex-distinct mortality tables, so long as the plan does not exact unequal contributions from employees based on such tables and so long as the plan offers retirement options which provide equal benefits to males and females.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

MITCHELL D. FRANKS
ASSISTANT ATTORNEY GENERAL
Department of Legal Affairs
The Capitol-Suite 1501
Tallahassee, Florida 32301
904-488-1573

DANIEL C. BROWN
GENERAL COUNSEL
Department of Administration
435 Carlton Building
Tallahassee, Florida 32301
904-488-4747

EXCERPTS OF PERTINENT STATUTORY AND CONSTITUTIONAL PROVISIONS

42 USC §2000e-2

§2000e-2. Unlawful employment practices
(a) It shall be an unlawful employment practice for an employer-
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

ART. X, Sec. 14, Florida Constitution (1968)

SECTION 14. State retirement systems benefit changes.-A governmental unit responsible for any retirement or pension system supported in whole or in part by public funds shall not after January 1, 1977, provide any increase in the benefits to the members or beneficiaries of such system unless such unit has made or concurrently makes provision for the funding of the increase in benefits on a sound actuarial basis.

FLORIDA STATUTES (1981)

§121.051(1)(a):
The provisions of this law shall be compulsory as to all officers and employees, except legislators who meet the requirements of s. 121.052(1)(c), who are employed

on or after December 1, 1970, of an employer other than those referred to in paragraph (2)(b), and each officer or employee, as a condition of employment, shall become a member of the system as of his date of employment, except that a person who is retired from any state retirement system and is re-employed on or after December 1, 1970, shall not be permitted to renew his membership in any state retirement system except as provided in s. 121.091(4)(e), for a person who recovers from disability, and s. 121.091(9)(d), for a person who is elected to public office. Officers and employees of the University Athletic Association, Inc., a nonprofit association connected with the University of Florida, employed on and after July 1, 1979, shall not participate in any state-supported retirement system.

§121.071(1), (2), (3):
(1) Until January 1, 1975, regular members shall contribute each pay period at the rate of 4 percent of gross compensation and special risk members shall contribute each pay period at the rate of 8 percent of gross compensation. Effective January 1, 1975, regular members and special risk members shall make no contribution to the system.
(2) Until January 1, 1975, each employer shall contribute an amount equal to the total of its member contributions, made under subsection (1), each pay period. Effective January 1, 1975, and until October 1, 1978, each employer shall contribute 9 percent of gross compensation each pay period for each of its regular members and 13 percent of gross compensation each pay period for each of its special risk members. Effective October 1, 1978, each employer shall contribute 9.1 percent of gross compensation each pay period for each of its regular members and 13.95

percent of gross compensation each pay period for each of its special risk members. Effective October 1, 1981, each employer shall contribute 10.93 percent of gross compensation each pay period for each of its regular members and 13.91 percent of gross compensation each pay period for each of its special risk members.
(3)(a) Effective January 1, 1975, each employer shall accomplish the increased contribution required by subsection (2) by a procedure in which no employee's gross salary shall be reduced.

§121.091(6):
(a) A member shall elect, prior to the receipt of his first monthly retirement payment, to receive the retirement benefits to which he is entitled under subsection (1), subsection (2), or subsection (3) of this section in accordance with one of the following options:
1. The maximum retirement benefit payable to the member during his lifetime.
2. A decreased retirement benefit payable to the member during his lifetime and, in the event of his death within a period of 10 years after his retirement, the same monthly amount shall be payable for the balance of such 10-year period to his beneficiary or, in case the beneficiary is deceased, in accordance with subsection (8) of this section as though no beneficiary had been named.
3. A decreased retirement benefit which shall be payable during the joint lifetime of both the member and his joint annuitant and which shall continue after the death of either during the lifetime of the survivor in the same amount.
4. A decreased retirement benefit which shall be payable during the joint lifetime of the member and his joint annuitant and

which shall continue after the death of either during the lifetime of the survivor in an amount equal to 66-2/3 percent of the amount which was payable during the joint lifetime of the member and his joint annuitant.

(b) The benefit payable under any option stated above shall be the actuarial equivalent, based on tables adopted by the administrator for this purpose, of the amount to which the member was otherwise entitled.

§121.135:

(1) Commencing in the year 1980, and every third year thereafter, the Division of Retirement of the Department of Administration shall make a report to the Legislature regarding the actuarial conditions of locally administered retirement plans or systems operated by the political subdivisions of the state and the compliance of such retirement plans or systems with the provisions of this act.

(2) The Department of Administration, through its Division of Retirement, shall make to each regular session of the Legislature a written report on the operation and condition of the state-administered retirement systems.

§121.192(2):

State retirement actuary.-The Division of Retirement may employ an actuary, as defined in s. 121.021(6). Such actuary shall, together with such other duties as the director of retirement may assign him, be responsible for:

(1) * * *

(2) Making periodic valuations of the retirement systems.

* * *